No. 83-128

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM GOUVEIA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Sixth Amendment requires appointment of counsel for an indigent prison inmate under criminal investigation during the time he is being held in administrative detention following the alleged offense but before the institution of adversary judicial proceedings.

2. Whether, in the absence of a specific showing of prejudice, dismissal of the indictment is the appropriate remedy for failure to appoint counsel once an indigent prison inmate is held in administrative detention more than 90 days because of a pending criminal investigation.

PARTIES TO THE PROCEEDINGS

In addition to the parties shown by the caption of this case, Robert Ramirez, Philip Segura, Adolpho Reynoso, Robert Eugene Mills, and Richard Raymond Pierce were appellants below and are respondents here.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-29a) is reported at 704 F.2d 1116. An earlier opinion of the court of appeals in the case of respondents Mills and Pierce (Pet. App. 30a-40a) is reported at 641 F.2d 785. An earlier opinion of the district court in the case of respondents Mills and Pierce (Pet. App. 41a-50a) is unreported. The oral opinion of the district court denying motions to dismiss the indictment in the case of the Gouveia respondents (J.A. 92-93) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 26, 1983. On June 17, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including July 25, 1983. The petition was filed on that date and was granted on October 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

STATEMENT

This case raises the question whether the Sixth Amendment requires that counsel be appointed for an indigent prison inmate under criminal investigation during the time he is held in administrative detention following the alleged offense, but before the institution of adversary judicial proceedings. The court of appeals consolidated appeals from two separate sets of district court convictions involving prison inmate murders, both of which raised this issue.

1. *Respondents Gouveia, Ramirez, Segura and Reynoso*

Following a jury retrial in the United States District Court for the Central District of California, all four respondents were convicted of murder and conspiracy to commit murder, in violation of 18 U.S.C. 1111 and 1117 respectively. Each was sentenced to consecutive terms of imprisonment for life and 99 years (Pet. App. 3a).

a. On November 11, 1978, inmate Thomas Trejo was stabbed to death at the Federal Correctional Institution at Lompoc, California. An autopsy revealed that Trejo had suffered 45 stab wounds, most of which were in the area of his heart (Tr. 149).[1]

Following the murder, the Federal Bureau of Investigation and prison officials began independent investigations to determine the identity of the murderers. Respondents Gouveia and Reynoso and inmate Pedro Flores were immediately placed in the Administrative Detention Unit ("ADU") at Lompoc

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[1] "Tr." signifies the transcript of the retrial in the case of the *Gouveia* respondents.

(J.A. 8, 10, 15, 44, 50). Inmates in ADU are separated from the remainder of the prison population, and their participation in various prison programs is curtailed. However, they are not deprived of regular visitation rights, exercise periods, access to legal materials, and telephones from which they can make unmonitored calls to attorneys. See Pet. App. 3a, 6a; 28 C.F.R. 540.101, 540.102, 540.105, 541.21, 541.22, 543.11(j), 543.13; J.A. 62; Tr. 2411.

On November 22, 1978, Gouveia, Reynoso, and Flores were removed from ADU and returned to the general prison population (J.A. 8, 15, 50). However, on December 4, 1978, all four respondents, as well as Flores and inmate Steven Kinard, were placed in ADU pending further investigation after prison officials obtained further information that implicated the six in the murder (see *id.* at 8, 12, 15, 31, 50). Later in December, prison authorities conducted disciplinary hearings. Respondents requested appointment of counsel at the hearings, but the requests were denied (*e.g.*, *id.* at 15, 31, 45). Prison officials determined that the four respondents each had participated in the murder of Trejo and ordered that they forfeit accumulated good time and be returned to ADU (Pet. App. 2a; Tr. 1214-1215).[2] Thereafter, prison

[2] The reasons for the decision to return respondents to administrative detention are not set forth clearly in the record. A prison form dated December 4, 1978, submitted as an exhibit to co-defendant Flores' motion to dismiss, indicates that he was placed in ADU pending investigation for violations of prison rules and crimes committed in the prison and because his "[c]ontinued presence * * * in general population pose[d] a serious threat" to other inmates and to the security of the institution (J.A. 12). Respondents presumably received forms containing similar information. See *id.* at 83-84, 86, 88-89. The same reasons for detention existed following the disciplinary hearing (with the exception of the investigation for violation of prison rules). A portion of the period of administrative detention following the hearing may also have served

authorities directed that Gouveia and Ramirez be transferred to the control unit of the United States Penitentiary in Marion, Illinois, based on a finding that they were too dangerous to be maintained in the general population at Lompoc (J.A. 33-34, 46-47).

In March 1979, after the FBI notified the United States Attorney of the results of its investigation, presentation of the matter to a grand jury commenced. On June 17, 1980, the grand jury indicted respondents, Flores, and Kinard for murder and conspiracy to commit murder. In addition, Reynoso, Kinard, and Flores were charged with conveyance of a weapon in a penal institution, in violation of 18 U.S.C. 1792. On July 14, 1980, respondents were arraigned in federal court, at which time they were appointed counsel (Pet. App. 3a).[3]

b. Prior to trial, respondents and Flores moved to dismiss the indictment on the ground that the 19-month period between their removal to ADU and their indictment violated their Sixth Amendment right to a speedy trial, or, alternatively, constituted unreasonable preindictment delay in violation of the Due Process Clause of the Fifth Amendment. They also argued that the failure of prison authorities to appoint counsel to represent them during the period they were in administrative detention, coupled with their own inability to begin preparation of a defense because of their segregation from the general inmate population, violated their Sixth Amendment right to effective assistance of counsel.

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disciplinary purposes, although this is not clear from the record. Gouveia and Ramirez probably were returned to ADU for the additional reason that they were pending transfer to another penal institution. See 28 C.F.R. 541.22(a).

[3] By the time of the indictment, several of the respondents had been transferred to other institutions. See, *e.g.*, J.A. 46. After the indictment, respondents were transferred to the Los Angeles County Jail. See Aug. 18, 1980, Hearing Tr. 24.

Respondents made various representations in support of their claims. For example, Gouveia acknowledged that he had obtained some information from the transcript of an FBI interview, and his counsel stated that he had located four potential defense witnesses by using inmate rosters furnished by the Bureau of Prisons; however, Gouveia's counsel asserted that he had been unable to obtain information about two other potential witnesses (J.A. 47, 65). Ramirez claimed that because of his segregation from the general population he had been unable to contact potential witnesses who could verify his whereabouts on the day of Trejo's death; that he knew several of these inmates only by nicknames and thus was unable to establish their identities or determine their whereabouts; and that a potential witness had died since the murder (*id.* at 34). Reynoso alleged that, as the result of his placement in ADU and the ensuing delay, it would be an "impossible task" to locate inmate witnesses, many of whom he knew only by nickname, and to corroborate his alibi that he was watching a football game at the time of the murder (*id.* at 19-20, 21). Segura alleged that he was unable to locate and interview potential witnesses because they had been transferred to other penal institutions and because he had insufficient means of identifying them, and that two alibi witnesses had recently died (*id.* at 27). Following oral argument, the district court denied respondents' motions to dismiss on the ground that "there has been an insufficient showing of actual prejudice to the [respondents] by the passage of time" (*id.* at 92).

c. Trial began on September 16, 1980. The jury acquitted Flores on all counts and acquitted Reynoso on the weapon conveyance count. However, the jury was unable to reach a verdict on the murder and

conspiracy charges against respondents, and a mistrial was declared on those counts (J.A. 1).

Retrial began on February 17, 1981. Kinard, who was the government's principal witness,[4] testified about the plans to murder Trejo. According to Kinard's testimony, Reynoso had told Kinard in early November 1978 that Trejo "had to go" by Christmas because he had made a "bad move against la cliqua" while incarcerated at Terminal Island (Tr. at 488-489); Ramirez had arranged for another inmate to make several knives with which the murder would be committed (*id.* at 489-500); and on the morning of the murder Reynoso stated that "the fool had to be sent home today" (*id.* at 512-513). Kinard described the four respondents' actions in preparing for the murder and disposing of the weapons and blood-stained clothing. Kinard related that, following the stabbing, Reynoso stated that "[t]he fool's gone * * * he ain't got no heart left" and boasted that he had held Trejo while the other respondents stabbed him (*id.* at 515-559).[5] The prosecution also introduced evidence that Gouveia's fingerprints and palm print and Segura's palm print were discovered in the cell in which the murder occurred (*id.* at 327-328, 443-444).

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[4] Kinard entered a plea of guilty on the weapon conveyance count prior to the first trial, with the understanding that the government would seek dismissal of the remaining counts and that he would testify on the government's behalf (Tr. 508-509).

[5] Several other prisoners corroborated portions of Kinard's testimony. For example, one inmate witness testified that he had observed Gouveia and Segura destroying blood-stained prison uniforms shortly after the murder in a cell near the location of the crime (Tr. 1011-1013, 1153-1157). Another testified that Reynoso returned from the prison disciplinary hearing and stated that he had lost only about 20 days' good time and that, if that was all prison authorities were going to do, he would kill again (*id.* at 1214-1215).

Respondents called 34 witnesses, including 14 alibi witnesses, to testify on their behalf (see Pet. App. 28a). Each respondent sought to establish that he was elsewhere at the time of the murder. In addition, the respondents presented evidence that the crime had been committed by others, including Kinard. See pages 56-57, *infra*, for a description of testimony presented by respondents.

2. *Respondents Mills and Pierce*

Following a jury trial in the United States District Court for the Central District of California, respondents Mills and Pierce were convicted of murder, in violation of 18 U.S.C. 1111, and of conveying a weapon in prison, in violation of 18 U.S.C. 1792. Pierce also was convicted of assaulting another prisoner, in violation of 18 U.S.C. 113(c). Each was sentenced to life imprisonment on the murder charge and to a concurrent three-year term on the weapon conveyance charge (Pet. App. 4a-5a). Pierce received an additional concurrent three-year term on the assault charge (Mills Tr. 1783).

a. On August 22, 1979, Thomas Hall, an inmate at Lompoc, died after being stabbed ten times in the "E" unit of the prison (Mills Tr. 445, 482-483). Shortly after the murder, Mills and Pierce were taken into custody and examined by an FBI agent and a prison doctor, who observed that Mills' face was flushed and that he had two puncture wounds on his left arm and a spot of blood on his thumbnail. Pierce's upper arm bore bruises that appeared to be finger impressions (Mills Tr. 461, 484, 619-621, 628). The following morning, Mills and Pierce were placed in ADU on the ground that they were pending investigation for criminal offenses and violation of prison regulations and that their continued presence in the general prison population "pose[d] a serious threat to life, property, self, staff, other inmates, or

to the security of the institution" (Pet. App. 33a-34a; J.A. 138, 139). The conditions of their confinement in ADU were identical to those described above for the *Gouveia* respondents (Pet. App. 31a).

During disciplinary hearings conducted by the Bureau of Prisons several weeks later, respondents stated that they wished to consult with counsel, but the request was denied (Pet. App. 31a; J.A. 129). Mills declined the offer of assistance of a staff representative to interview witnesses and help prepare his case for the disciplinary proceeding (*id.* at 129-130). See 28 C.F.R. 541.14(b). Prison officials concluded that Mills and Pierce had murdered Hall and returned them to ADU. The two were ordered to forfeit their accumulated good time (Pet. App. 4a). In addition, prison officials informed Mills that he would be transferred to the control unit at Marion Penitentiary (J.A. 130).

On March 27, 1980, after Mills and Pierce had been in administrative detention for approximately seven months, they were indicted by a grand jury. At the time of their arraignment on April 21, 1980, respondents were appointed counsel (Pet. App. 4a).[4]

b. Mills and Pierce moved to dismiss the indictment on the grounds that their administrative detention for seven months prior to return of the indictment violated their Sixth Amendment right to a speedy trial or, alternatively, constituted unreasonable preindictment delay. They also contended that the failure of prison authorities to appoint counsel to represent them when they were placed in administrative detention violated their Sixth Amendment right to counsel.

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[4] Following their indictments Mills and Pierce were moved to Los Angeles County Jail and to the Terminal Island facility in Los Angeles (J.A. 134).

In support of their claims of prejudice, Mills and Pierce alleged that lack of access to witnesses during the period in which they were confined in ADU "severely undermined" their ability to prepare a defense; that the time lapse following the murder prevented witnesses from recalling the details of the evening of August 22, 1979, "as clearly as they had * * * last fall," and that, in many cases, "defense witnesses are unable * * * to remember who they were with [and] the times crucial events took place" (Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment (Mills C.R. 59) at 16).[7] Respondents also alleged that the release or transfer of some potential witnesses to other institutions had made it difficult to locate them, that it was impossible to find other potential witnesses who were known only by nicknames, that some witnesses were reluctant to testify, and that memories had faded (*id.* at 16-17; J.A. 125-126, 149-155). Finally, respondents claimed that the time lapse made it impossible to analyze blood stains found on clothing; that evidence relating to the case had been lost or destroyed; and that their own physical wounds, which might have had some probative value for their defense, had healed (*id.* at 126; Reply to Government's Opposition to Motion to Dismiss (Mills C.R. 73) at 7-8).

On August 14, 1980, the district court granted the motion to dismiss the indictment (Pet. App. 41a-50a). The court first concluded that respondents stood accused of the murder at the time they were committed to ADU and that, because the government failed to justify the ensuing ten-month delay in

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[7] "Mills C.R." signifies the district court Clerk's Record in the case of the *Mills* respondents. The number following the abbreviation corresponds with the entry number on the district court docket sheet.

bringing them to trial, they were denied their Sixth Amendment right to a speedy trial. Alternatively, the court found that respondents were denied due process because their continued administrative detention after the government had substantially completed its investigation irreparably prejudiced their ability to prepare for trial. Finally, the court found that the government's failure to appoint counsel to represent respondents promptly after their placement in ADU deprived them of the Sixth Amendment right to counsel, as well as their due process right to prepare a defense. The court reasoned that respondents "were denied any effective opportunity to have an investigation conducted on their behalf while events were still recent and recollections intact" and that the passage of time "resulted in the irrevocable loss of exculpatory testimony and evidence * * *" (*id.* at 49a, 50a).

c. The court of appeals reversed (Pet. App. 30a-40a). It rejected the district court's holding that the ten-month delay between respondents' placement in ADU and the trial violated the Sixth Amendment Speedy Trial Clause, since administrative detention by prison authorities is not an "arrest" or "accusal" for speedy trial purposes (*id.* at 34a). The court of appeals held that the right to counsel did not attach until the initiation of formal adversary proceedings by way of indictment in March 1980 (*ibid.*). Finally, the court noted respondents' claims of prejudice, but dismissed them as speculative (*id.* at 36a-37a).[8]

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[8] Judge Nelson issued a concurring opinion in which she stated that respondents' due process claims could properly be raised at trial (Pet. App. 40a).

Following the court of appeals' reversal of the order dismissing the indictment, both respondents filed petitions for writs of certiorari, which were denied by this Court. 454 U.S. 902 (1981).

d. At trial, the government presented eyewitness testimony linking Mills and Pierce to the murder of Hall. The evidence showed that prior to the murder Mills told another inmate that he knew who was responsible for providing information that caused Mills to be placed temporarily in administrative detention and that Mills was going to "take care of it" upon his release from detention (Mills Tr. 344-345); in fact, it was Hall who had provided the information to prison authorities (*id.* at 474-476). The day before the murder Hall confronted Mills and demanded repayment of a debt (*id.* at 289). On the day of the murder there were several confrontations between Hall and Mills and Pierce (*id.* at 76-77, 291-292). After dinner, inmate Mellen, who was Hall's friend, heard Hall scream for help; he then saw Mills hold Hall from behind while Pierce stabbed Hall in the abdomen (*id.* at 88-96, 109).

Other witnesses corroborated Mellen's testimony. For example, inmate Ehle testified that before the murder he had overheard Mills tell inmate John Able, identified as the leader of a prison gang known as the Aryan Brotherhood, that Mills was going to "move on" an inmate who owed him money; Mills asked Able whether the murder would make him eligible for membership in the Brotherhood (Mills Tr. 561-563). Ehle also testified that he overheard Mills discussing the murder with Able after it occurred (*id.* at 591-593). A substantial amount of physical evidence, including blood-stained clothing and wounds on the arms of both Mills and Pierce, linked respondents to the murder (*id.* at 189-190, 418-425, 508-510, 618-621).

Mills and Pierce presented 42 witnesses, including six alibi witnesses. Those witnesses testified, inter alia, that Mills and Pierce were eating a meal at the time of the crime and were locked in the dining hall

with other prisoners immediately after its discovery, and that Hall's assailants were masked at all times, so that their identities could not be determined. See pages 57-59, *infra*, for a description of testimony by respondents' witnesses.

3. *The Decision of the Court of Appeals*

The en banc court of appeals consolidated the *Gouveia* and *Mills* cases. By a vote of six to five, it reversed the convictions and remanded for dismissal of the indictments. The majority held that when an inmate is separated from the general prison population for more than 90 days pending a criminal investigation, the Sixth Amendment requires that he be appointed counsel (Pet. App. 17a).

The majority recognized that under this Court's decisions the right to counsel attaches only when formal judicial proceedings are initiated. It reasoned, however, that "[t]he point of 'accusation' may be different for the prosecution of prison crimes, where the subject is already incarcerated and subject to the discretion and discipline of federal authorities" (Pet. App. 7a). Proceeding from this premise, the majority concluded that, although separation of inmates from the general prison population properly serves disciplinary and security functions (*id.* at 10a), such detention becomes "accusatory" when one of the purposes is to isolate the prisoner pending investigation and trial (*id.* at 11a).

The majority acknowledged (Pet. App. 11a) that administrative detention is necessary to further important governmental investigative interests, such as the protection of potential witnesses in the prison population. However, it observed that such detention deprives the prisoner of the opportunity to prepare a defense or even to keep track of the location of other inmate-witnesses in a transient prisoner population. This inability, the majority reasoned,

"distinguishes [respondents] from suspects outside of prison who have not yet been arrested or indicted;" the position of such detainees "more resembles that of a suspect outside of prison who has been arrested and detained than that of an outside suspect who has been neither arrested nor detained" (*id.* at 12a). The majority noted that a suspect outside prison who is arrested and detained normally is arraigned without delay, at which time the right to counsel attaches; it concluded by analogy that "the administrative detention of an indigent inmate who is suspected of a crime does, under certain circumstances, give rise to the right to appointed counsel" (*id.* at 13a, 15a).

The majority then considered the circumstances under which administrative detention would trigger the right to counsel. Purporting to interpret applicable Bureau of Prisons regulations, the majority concluded that the maximum stay in segregation for purely disciplinary reasons is 90 days, and that any segregation for a period exceeding 90 days must be for investigative purposes. The majority stated that "[i]f an inmate is held after the maximum disciplinary period has expired, he should be allowed to show that his detention, at least in part, is due to pending investigation or trial for a criminal act" (Pet. App. 17a). If the inmate establishes indigency and requests counsel, "prison officials must either refute the inmate's showing, appoint counsel, or release the inmate back into the general prison population" (*ibid.*). The majority concluded that prison authorities had violated the 90-day rule it had fashioned and that respondents thus had been denied the right to counsel.[9]

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[9] The majority found it unnecessary to reach respondents' claims based on the Fifth and Eighth Amendments (Pet. App. 5a).

The majority then held that dismissal of the indictments was the appropriate remedy (Pet. App. 20a-23a). It acknowledged (*id.* at 20a) that under *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981), the remedy for Sixth Amendment deprivations must be tailored to the injury suffered. It rejected the government's argument that none of the respondents had demonstrated actual and specific prejudice. The majority concluded that the belated appointment of counsel, coupled with respondents' prolonged administrative detention following the murders, handicapped the ability of respondents' attorneys to defend them at trial, citing the respondents' allegations of prejudice and the statements of the district court that had dismissed the indictments in the *Mills* case at the pretrial stage (Pet. App. 20a-23a). The majority concluded that in any event it was appropriate to presume prejudice because ordinarily it would be difficult to prove or refute its existence (*id.* at 22a-23a).

Judge Wright dissented in an opinion joined by Judges Choy, Kennedy, Anderson, and Poole (Pet. App. 24a-29a). The dissenters pointed out that the majority had confused right to counsel principles with speedy trial principles when it applied a de facto accusation concept. They concluded that extension of the right to counsel to the preindictment investigative period contravenes decisions in which this Court has stated that the right to counsel attaches only at the time adversary judicial proceedings are initiated. The dissenters also noted that the majority's presumption of prejudice and dismissal of the indictment were inconsistent with *United States* v. *Morrison*, *supra*. They pointed out that the potential prejudice referred to by the majority resulted primarily from the passage of time, rather than from ineffective assistance of counsel (Pet. App. 28a), and

that there are adequate remedies, short of dismissal of the indictment, for prejudice resulting from any governmental interference with access to witnesses (*id.* at 28a-29a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held that the Sixth Amendment requires appointment of counsel for indigent inmates held in administrative detention for more than 90 days pending criminal investigation. It held further that dismissal of the indictment is the proper remedy for the failure to provide counsel under such circumstances.

1. Each respondent was placed in the administrative detention unit at Lompoc after being identified as a suspect in a prison murder, and each remained there until he was transferred to another institution. Bureau of Prisons regulations define administrative detention as "the status of confinement of an inmate in a special housing unit in a cell either by himself or with other inmates which serves to remove the inmate from the general population" (28 C.F.R. 541.22). An administrative detainee normally is confined to his cell except for regular exercise, shower, and visitation periods, and he is deprived of the usual interaction with his fellow prisoners that is provided by shared meals, work and recreation. However, administrative detainees generally are afforded the same privileges as are made available to general population inmates (*e.g.*, commissary, visitation, and correspondence privileges). See 28 C.F.R. 541.22 (d); J.A. 62.[10]

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[10] Bureau of Prisons regulations distinguish between "administrative detention" and "disciplinary segregation." Under the regulations, "[i]nmates housed in disciplinary segregation have significantly fewer privileges than those housed in administrative detention" (28 C.F.R. 541.12(a)).

Bureau of Prisons regulations provide that inmates may be placed in administrative detention in a variety of circumstances. See 28 C.F.R. 541.22(a). In particular, prison officials may place an inmate in administrative detention "when [his] continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution and when the inmate * * * [i]s pending investigation or trial for a criminal act" (*ibid*).[11] Separation of inmate-suspects from the general prison population during the course of a criminal investigation serves a variety of important security purposes, including protection of potential inmate-witnesses from intimidation and prevention of subornation of perjury. It is these all too substantial concerns that underlay the placement of respondents in administrative detention during the time the FBI and prosecutors investigated the murders.

2. a. The court of appeals erred in concluding that the Sixth Amendment requires that counsel be appointed for an indigent prison inmate who is in administrative detention pending a criminal investigation. This Court has held consistently that the Sixth Amendment right to counsel attaches only at or after the institution of adversary judicial proceedings. Thus, respondents had no right to appointment of counsel until they were indicted.

The court of appeals' attempt to analogize segregation of an inmate from the general prison population for more than 90 days pending a criminal investiga-

[11] Under the regulations, an inmate may also be placed in administrative detention if he is pending hearing or investigation in connection with a violation of prison regulations, is pending transfer to another institution, needs protection, or is terminating confinement in disciplinary segregation and placement in the general prison population is not prudent (28 C.F.R. 541.22(a)).

tion to a formal accusation is misplaced. It is prison authorities, not prosecutors, who impose administrative detention; moreover, the purpose of such detention is not to accuse but to preserve the safety of others (particularly potential witnesses) and the security of the institution. The court of appeals' additional analogy to an arrest outside prison walls also fails to support its right to counsel analysis. It is not arrest alone that triggers Sixth Amendment rights; rather, it is arrest and holding to answer a criminal charge. Respondents were not held to answer a criminal charge until they were indicted.

The court of appeals based its departure from well-settled right to counsel principles in part on its belief that an inmate who is held in administrative detention is severely disadvantaged, in comparison to an inmate in the general prison population, in his ability to conduct an investigation of the crime and to prepare a defense during the period prior to the time he is actually charged. We submit that the court of appeals erred by, on the one hand, underestimating the opportunities available to inmates in administrative detention to take steps to preserve favorable evidence and, on the other hand, exaggerating the likelihood that inmates released to the general prison population would take significant and legitimate actions to gather evidence that would be unavailable if they remained in segregation. In fact, these differences are not of sufficient consequence to justify the court of appeals' departure from settled Sixth Amendment principles.

b. Assuming arguendo that respondents had a Sixth Amendment right to appointment of counsel after they had been held in administrative detention for 90 days pending criminal investigation, the court of appeals erred in concluding that dismissal of the indictments was the proper remedy when there was

no showing of actual and specific prejudice. This Court has made clear that dismissal of the indictment normally is not an appropriate remedy even for deliberate violations of the right to counsel. See *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981). The court of appeals' conclusion that dismissal of the indictment can be based on a potential for prejudice or that a presumption of prejudice is appropriate in connection with administrative detention is inconsistent with the principles articulated in *Morrison*. In fact, a court must conduct a case-specific, post-trial analysis to determine whether a defendant has suffered actual and specific prejudice as a result of the failure to appoint counsel in the preindictment period.

The record in this case illustrates the court of appeals' error in presuming prejudice in connection with administrative detention. In alleging prejudice, respondents failed to show what testimony alleged missing witnesses would have given and how it would have aided the defense; moreover, they did not explain why the testimony would not have been cumulative in view of the numerous alibi witnesses they presented at trial. In addition, respondents Mills and Pierce failed to show that they were prejudiced by the deterioration of physical evidence, which in any event could not have been prevented by their release from administrative detention.

ARGUMENT

I. THE SIXTH AMENDMENT DOES NOT REQUIRE THAT COUNSEL BE APPOINTED FOR AN INDIGENT PRISON INMATE DURING THE PERIOD HE IS HELD IN ADMINISTRATIVE DETENTION PENDING A CRIMINAL INVESTIGATION BUT PRIOR TO THE INSTITUTION OF ADVERSARY JUDICIAL PROCEEDINGS

The court of appeals' conclusion (Pet. App. 17a) that an indigent inmate who is segregated from the

general prison population for more than 90 days because of an ongoing investigation of a prison crime must either be appointed counsel or returned to the general prison population represents a radical departure from the decisions of this Court, which has held consistently that the right to counsel attaches only at the initiation of adversary judicial proceedings. Nothing in the circumstances of this case warrants the court of appeals' "unprecedented expansion of the right to counsel" (*id.* at 24a).[12]

A. The Sixth Amendment Right to Counsel Attaches Only At the Time of Institution of Adversary Judicial Proceedings

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." This Court's decisions firmly establish, as the text of the provision itself suggests, that the right to counsel attaches only at or after the initiation of adversary judicial proceedings:

> In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell* v. *Alabama*, 287 U.S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama*, *supra*; *Johnson* v. *Zerbst*, 304 U.S. 458; *Hamilton* v. *Alabama*, 368 U.S. 52;

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[12] This case involves only the issue of the right to appointment of counsel for indigent inmates. Respondents were not denied the opportunity to retain their own counsel during the time they were in administrative detention (Pet. App. 3a, 6a). Nor was there any claim that respondents' trial counsel rendered ineffective assistance apart from the contention that failure to appoint counsel at an earlier stage impeded the ability to mount a fully effective defense.

Gideon v. *Wainwright*, 372 U.S. 335; *White* v. *Maryland*, 373 U.S. 59; *Massiah* v. *United States*, 377 U.S. 201; *United States* v. *Wade*, 388 U.S. 218; *Gilbert* v. *California*, 388 U.S. 263; *Coleman* v. *Alabama*, 399 U.S. 1.

* * * * *

* * * [W]hile members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Kirby v. *Illinois*, 406 U.S. 682, 688-689 (1972) (plurality opinion) (emphasis in original). The Court has reaffirmed this principle on several occasions since the *Kirby* decision. See *Estelle* v. *Smith*, 451 U.S. 454, 469-470 (1981); *Moore* v. *Illinois*, 434 U.S. 220, 226-227 (1977); *Brewer* v. *Williams*, 430 U.S. 387, 398-399 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976) (opinion of Burger, C.J.).[18]

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[18] In their briefs in opposition, several respondents suggested that this Court's decisions in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), indicate that a Sixth Amendment right to counsel may arise prior to the formal initiation of adversary judicial proceedings. See, *e.g.*, Segura Br. in Opp. 10; Ramirez Br. in Opp. 5, 7. In those cases the Court indicated that a suspect subjected to custodial interrogation would be entitled to have counsel present during that interrogation. But on several occasions the Court has made clear that *Escobedo* and *Miranda* were not intended to vindicate the Sixth Amendment right to counsel, but rather to ensure full effectuation of the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination. See *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n.4 (1980); *Kirby* v. *Illinois*, 406 U.S. at 688, 689; *Johnson* v. *New Jersey*, 384 U.S. 719, 729 (1966). Moreover, as the

The Court's holding that the right to counsel does not attach until the initiation of adversary judicial proceedings is firmly grounded in both the language and the purposes of the Sixth Amendment. That provision refers to the right to counsel in "criminal prosecutions" only. See *Kirby* v. *Illinois*, 406 U.S. at 690. "The requirement that there be a 'prosecution,' means that this constitutional 'right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [an accused] * * *.'" *United States* v. *Ash*, 413 U.S. 300, 321-322 (1973) (Stewart, J., concurring) (quoting *Kirby*, 406 U.S. at 688). Until the initiation of adversary judicial proceedings—through formal charge, preliminary hearing, indictment, information, or arraignment[14]—there is no "prosecution" to which the right of counsel can attach.

The purposes served by the Sixth Amendment right to counsel also support the Court's reading. One purpose is to ensure that an accused may be guided in the intricacies of the law at every "critical stage" of the proceedings against him. See, *e.g.*, *United States* v. *Ash*, 413 U.S. at 307-308, 311; *Coleman* v. *Alabama*, 399 U.S. 1, 7 (1970) (plurality opinion); *United States* v. *Wade*, 388 U.S. 218, 227 (1967). As the Court explained in *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), an accused needs counsel in order to determine "whether the indictment is good or bad," to aid him with "the rules of evidence," to ensure that he is not "put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible," and to provide "the skill and knowledge

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Court noted in *Kirby*, 406 U.S. at 689, *Escobedo* has been limited to its own facts.

[14] See *Estelle* v. *Smith*, 451 U.S. at 469-470; *Moore* v. *Illinois*, 434 U.S. at 226-227; *Kirby* v. *Illinois*, 406 U.S. at 689.

adequately to prepare his defense." Accord, *Gideon* v. *Wainwright*, 372 U.S. 335, 345 (1963).

The right to counsel also helps to minimize the imbalance in the adversary system that resulted from the creation of the office of public prosecutor. The Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463 (1938). See also *United States* v. *Ash*, 413 U.S. at 309. The test for determining whether the right to counsel attaches to a particular event thus rests on an "examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary" (*id.* at 313).

The initiation of adversary judicial criminal proceedings—the point at which the right to counsel attaches—"is far from a mere formalism" (*Kirby* v. *Illinois*, 406 U.S. at 689). "[I]t is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Ibid.* The right is "historically and rationally applicable only after the onset of formal prosecutorial proceedings" (*id.* at 690).

In this case there was no adversary judicial proceeding prior to the dates the respondents were indicted. During the period prior to indictment, when prison officials held respondents in administrative detention, the government had not initiated a criminal prosecution. Thus, under this Court's decisions, the

right to counsel did not attach during that period, and appointment of counsel was not required by the Sixth Amendment.

B. Segregation of an Inmate From the General Prison Population Pending a Criminal Investigation Is Not Tantamount to a Formal Accusation That Would Trigger the Right to Counsel

The court of appeals attempted to justify its departure from this Court's right to counsel decisions by suggesting that the statements in those decisions do not apply to a "prison case" (Pet. App. 7a). According to the court of appeals (*id.* at 11a), "[a]dministrative detention at times serves an accusatory function * * *." Based on its reading of Bureau of Prisons regulations, the court of appeals created a presumption that any period of segregation of more than 90 days following a prison crime is tantamount to "an accusation which generates a Sixth Amendment right to the assistance of counsel" (*id.* at 18a).[15]

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[15] In developing its theory of when segregation from the general prison population would become "accusatory," the court of appeals appears to have misconstrued Bureau of Prisons regulations. The court concluded (Pet. App. 17a) that the maximum period of segregation for disciplinary purposes is 90 days and that "[i]solation for more than ninety days, then, is necessarily for some purpose other than discipline." Under 28 C.F.R. 541.11 a prisoner may, following a disciplinary hearing, be placed in disciplinary segregation for up to 60 days (for a single offense) and may be given consecutive terms of up to 60 days for each additional offense. Following termination of disciplinary segregation, an inmate may be held in post-disciplinary (administrative) detention for up to 90 days. See 28 C.F.R. 541.22(a)(6). Thus, on the basis of a single disciplinary infraction a prisoner could be segregated for a period of up to 150 days following a disciplinary hearing. Although the regulations do not place specific time limitations on the duration of a prisoner's confinement in administrative detention, they state that such detention "is to be used only for short periods of time except where an inmate needs long-term

But that reasoning is plainly wrong and does not support the court of appeals' conclusion that a right to counsel attaches during the period of administrative detention.

The court of appeals erred in equating segregation from the general prison population for more than 90 days with an accusation that initiates a criminal prosecution. It is prison authorities, not prosecutors or police, who make the decision to place an inmate in administrative detention and to retain him there.[16] The Fifth Circuit explained this point in *United States* v. *Duke*, 527 F.2d 386, 390, cert. denied, 426 U.S. 952 (1976) (emphasis added):

> [*A*]*dministrative segregation is an internal disciplinary means of classifying prisoners, utilized under the almost total discretion of prison officials* * * *. Used as a method of disciplining or investigating inmates who break prison regulations, of protecting certain inmates from mem-

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protection" and that the prison staff must conduct hearings to review the status of prisoners in administrative detention at 30-day intervals. See 28 C.F.R. 541.22(c).

[16] Indeed, in the *Mills* case, the prosecutor stated, in response to a question from the district court, that he had been unaware that Mills and Pierce had been in administrative detention and that he had had "no communication with prison officials with respect to the status of [respondents] until March," *i.e.*, until shortly before the return of the indictment (J.A. 172).

The district court in the *Mills* case disregarded the prosecutor's explanation that he and the prison authorities had acted independently. The court observed that "for purposes of this case [it] would not distinguish between the Department of Justice [and] the Bureau of Prisons" (J.A. 172). The court of appeals likewise concluded that it "need not inquire into the extent of cooperation between prison officials, the FBI, and the United States Attorney" in placing inmates in administrative detention in determining whether such detention is "accusatory" (Pet. App. 15a).

> bers of the general population, and of providing a general cooling-down period for inmates involved in events that could disrupt the general population, *administrative segregation accompanying the breach of a prison regulation is in no way related to or dependent on prosecution by the federal government of an inmate for th[e] same offense as a violation of federal criminal law.*

See also *United States* v. *Mills*, 704 F.2d 1553, 1557 (11th Cir. 1983), petition for cert. pending, No. 83-5286 (disciplinary segregation, like administrative segregation, is "distinct from the judicial system").[17]

The purpose of administrative detention is not to accuse an inmate or to initiate adversary judicial proceedings. Rather, the objective is to maintain prison security and to assure the safety of prison staff and other inmates, including potential witnesses.[18]

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[17] The existence of an ongoing criminal investigation while respondents were in administrative detention did not amount to a formal accusation for purposes of the Sixth Amendment. See *United States* v. *MacDonald*, 456 U.S. 1, 8-9 (1982) (absent a formal charge, an ongoing criminal investigation does not trigger the Sixth Amendment right to a speedy trial); *United States* v. *Marion*, 404 U.S. 307, 313, 320 (1971).

The court of appeals suggested that administrative detention was equivalent to an accusation for Sixth Amendment purposes because it is a "public act" (Pet. App. 15a). But the court's suggestion disregards its own precedent, *United States* v. *Clardy*, 540 F.2d 439, 441 (9th Cir.), cert. denied, 429 U.S. 963 (1976), in which it stated that segregation of an inmate from the general prison population is "not a public act with public ramifications, but a private act." Even if administrative detention did constitute a "public act," like an arrest, that would not be sufficient to support a finding of a Sixth Amendment right to counsel. See pages 29-31, *infra*.

[18] The court of appeals itself observed (Pet. App. 10a) that administrative detention "is perhaps the princip[al] remedy available to prison officials when crime or other disturbances threaten the prison environment."

Prison officials place an inmate in administrative detention only upon concluding that "his continued presence in the general population poses a serious threat to life, property, self, staff, other inmates or to the security or orderly running of the institution * * *" (28 C.F.R. 541.22(a)). The reasons for detention include, inter alia, a pending hearing or investigation for a violation of institution regulations or a pending investigation or trial for a criminal act (28 C.F.R. 541.22(a) (1)-(3)). In fact there are frequently several independent and concurrent reasons for keeping an inmate in administrative detention during the period in which he is under criminal investigation. Once prison officials conclude that an inmate has committed a murder, they may believe it necessary to segregate him in order to protect prison staff members and other inmates, regardless of whether a criminal investigation is pending.[19] Such inmates are likely to be among the most dangerous in the prison system, and prison officials would be remiss in failing to take protective measures that may include administrative detention. In addition, an inmate who has been found by prison officials to have committed a violent prison crime may be held in administrative detention pending transfer to a higher security level institution when space permits. See 28 C.F.R. 541.22(a)(4).

Consistent with the regulations, respondents were kept in administrative detention because of the pendency of the criminal investigation of the murders they were suspected of committing and also because of prison officials' belief that their "[c]ontinued presence * * * in the general population [would] pose[] a serious threat" to other inmates "and to the security

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[19] See, *e.g.*, Tr. 1214-1215 (respondent Reynoso's statement that if prison authorities were only going to deprive him of 20 days' good time for his role in the murder, he would kill again).

of the institution" (J.A. 10, 12, 138, 139). See pages 3-4 note 2, 7-8 *supra*. Respondents Mills, Pierce, Gouveia and Ramirez presumably were kept in administrative detention for the additional reason that they were pending transfer to another penal institution. See Pet. App. 44a; J.A. 33-34, 46-47, 130.[20]

Even if respondents had been segregated from the general prison population for the sole reason that they were pending criminal investigation, it is abundantly clear that such detention cannot be equated with accusation for Sixth Amendment purposes. This Court has recognized that segregation of inmate-suspects from the general prison population pending investigation of prison offenses serves important security purposes, especially the protection of potential witnesses. In *Hewitt* v. *Helms*, No. 81-638 (Feb. 22, 1983), slip op. 12 (citations omitted), the Court stated:

> The safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration. Likewise, the isolation of a prisoner pending investigation of

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[20] In their briefs in opposition Segura and Ramirez suggest that they were segregated from the general prison population for punitive reasons following their prison disciplinary hearings. Segura Br. in Opp. 8; Ramirez Br. in Opp. 5. If that were so it would not affect the conclusion that there nevertheless as yet existed no criminal prosecution in which they were entitled to appointment of counsel. This Court has made clear that there is no right to counsel in connection with prison disciplinary proceedings. See *Baxter* v. *Palmigiano*, 425 U.S. 308, 314-315 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974). See also *United States* v. *Mills*, 704 F.2d at 1557 (even when its purpose is "entirely punitive," prison segregation is not equivalent to the onset of accusatory judicial proceedings). In fact, however, the record is unclear as to whether respondents' detention was imposed in part for disciplinary reasons or solely for administrative purposes (*i.e.*, because of the pending investigation and security concerns).

> misconduct charges against him serves important institutional interests relating to the insulating of possible witnesses from coercion or harm.

It went on to note that the state "must protect possible witnesses—whose confinement leaves them particularly vulnerable—from retribution by the suspected wrongdoer, and, in addition, has an interest in preventing attempts to persuade such witnesses not to testify at disciplinary hearings" (*id.* at 14-15). See also *id.* at 16 n.9 (noting that pendency of a state criminal investigation was a factor properly taken into account in continuing administrative detention).

These concerns are by no means trivial. In the *Gouveia* case, the prosecutor informed the district court that he was reluctant to turn over to the defense a month before trial the names of six inmate-witnesses whose testimony the government planned to present, since three of the six had been the objects of attempted murders when it became known that they were interested in cooperating with the government. See Aug. 18, 1980, Hearing Tr. 27-28.[21]

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[21] In the *Mills* case an inmate called as a defense witness refused to testify, apparently because he believed a recent attempt on his life was related to the testimony he might give (Mills Tr. 1071-1079). In addition, there is evidence that members of the Aryan Brotherhood, to which respondent Mills sought admission (Mills Tr. 562-563), have sworn, among other anti-social undertakings, to perjure themselves on behalf of fellow members who may be prosecuted. See *United States* v. *Abel*, 707 F.2d 1013, 1016 (9th Cir. 1983), petition for cert. pending, No. 83-935 (filed Dec. 6, 1983). Brotherhood members apparently attempt to prevent others from testifying against their members as well. In one case an inmate was so fearful of appearing as a prosecution witness in a murder trial involving a member of the Brotherhood that he feigned suicide in order to obtain special protection from the government. See *United States* v. *Mills*, 704 F.2d at 1560. *See also United States* v. *Castillo*, 615 F.2d 878, 885 (9th Cir.

Plainly the administrative detention of inmate-suspects pending a criminal investigation does not constitute some sort of symbolic "accusation"; the heart of the rationale for such detention is practical —protection of potential inmate-witnesses from intimidation and prevention of subornation of perjury.

The court of appeals attempted to bolster its analysis by drawing an analogy between administrative detention of an inmate and arrest of a suspect outside prison. The court noted (Pet. App. 12a-13a) that outside prison a suspect who is arrested and detained must appear before a magistrate without unnecessary delay and that such a suspect would be guaranteed the assistance of counsel at the time of that appearance. But it is not arrest and detention by law enforcement authorities that triggers the Sixth Amendment right to counsel; rather, it is the decision by prosecutors to initiate formal adversary judicial proceedings.[22] "An arrest on probable cause without a warrant, even though that arrest is for the crime with which the defendant is eventually charged, does not initiate adversary judicial criminal proceedings * * *." *Caver* v. *Alabama*, 577 F.2d 1188, 1195

1980) (suspect in a prison murder case attacked an inmate who had cooperated with the FBI investigation of the murder).

[22] Moreover, even when an attorney is appointed for a defendant in connection with a particular event that takes place following indictment, that attorney's responsibilities do not routinely extend to investigation and preparation of the defense. See *United States* v. *Daly*, 716 F.2d 1499, 1504-1505 (9th Cir. 1983), in which the court noted that counsel had been explicitly appointed to represent the defendant at a bail hearing following indictment. The court held that under the Speedy Trial Act, the 30-day period between appearance through counsel and trial begins to run only after the defendant has first appeared with counsel who has been engaged or appointed to represent him at trial.

(5th Cir. 1978). See also *Kirby* v. *Illinois*, *supra* (no right to counsel at preindictment show-up following arrest); *Lomax* v. *Alabama*, 629 F.2d 413, 415-416 (5th Cir. 1980), cert. denied, 450 U.S. 1002 (1981) (arrest with or without a warrant falls far short of an official accusation by the state that would trigger a right to counsel for the arrested individual).

The court of appeals invoked cases involving the Sixth Amendment right to a speedy trial in support of its arrest analogy. See Pet. App. 7a-8a, 24a-25a. But the decisions in those cases make clear that the speedy trial right is not triggered merely by arrest or detention; instead, both arrest *and* holding to answer a criminal charge (which is necessary if authorities are to continue to hold a suspect) are required in order to engage the right to a speedy trial. See *United States* v. *MacDonald*, 456 U.S. 1, 7 (1982) ("no Sixth Amendment right to a speedy trial arises until charges are pending"); *id.* at 8-9 (speedy trial guarantee inapplicable once charges are dismissed); *United States* v. *Marion*, 404 U.S. 307, 320 (1971) ("it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge" that engage the right to a speedy trial); *id.* at 321 (referring to a defendant who "has been arrested and held to answer"). Cf. *Dillingham* v. *United States*, 423 U.S. 64 (1975). Respondents were not held to answer a criminal charge until they were indicted. See *United States* v. *Duke*, 527 F.2d at 389-390 (for purposes of speedy trial analysis, defendant was not "charged" with a crime while he was in administrative segregation).[23] Thus, the court of appeals' analogy to an in-

[23] The courts of appeals have held uniformly that segregation from the general prison population does not trigger the Sixth Amendment right to a speedy trial. See *United States* v. *Mills*, 704 F.2d at 1556-1577; *United States* v. *Daniels*, 698

dividual arrested outside the prison setting is simply inadequate to support its creation of a right to counsel.

C. Respondents' Allegations That They Were Deprived of the Opportunity to Investigate and Prepare an Effective Defense Do Not Support a Departure From the Longstanding Principle Governing Attachment of the Sixth Amendment Right to Counsel

As we have shown above, the general principle that Sixth Amendment assistance of counsel rights do not attach prior to the institution of formal judicial proceedings is well settled. The question here is whether the court of appeals was correct in carving out an exception—impossible to discern in the constitutional text—for prisoner suspects segregated from the general prison population for more than 90 days.

The court of appeals did not hold that indigents suspected of crimes must generally be appointed counsel under the Sixth Amendment—although such action would doubtless be of some value to their ability to mount an effective defense in the event they are ultimately charged. Nor did it find such a right for incarcerated indigent suspects as a class. Each of these in turn might be seen as logical developments growing out of the court of appeals' initial departure from the general Sixth Amendment rule, but at this juncture they so manifestly contradict the basic principles laid down by this Court that they were doubt-

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F.2d 221, 223 (4th Cir. 1983); *United States* v. *Blevins*, 593 F.2d 646, 647 (5th Cir. 1979); *United States* v. *Bambulas*, 571 F.2d 525, 527 (10th Cir. 1978); *United States* v. *Clardy*, 540 F.2d at 441; *United States* v. *Duke*, 527 F.2d at 389-391. Despite its reliance on concepts developed in speedy trial cases, the court of appeals here found inapposite its own holding in *Clardy* that segregation of prison inmates does not trigger the right to a speedy trial. See Pet. App. 14a.

less recognized to be beyond the innovative powers of a lower court.[24]

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[24] This Court has never suggested that a constitutional right to counsel attaches prior to initiation of adversary judicial proceedings whenever an individual lacks investigative resources or otherwise faces obstacles to investigation. In fact, to the extent this Court's decisions touch on the subject of investigation, they suggest the absence of any such right. See, *e.g.*, *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983), slip op. 9 ("Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a Sixth Amendment right to counsel"); *United States* v. *Ash*, 413 U.S. at 317-318 (right to counsel applies to trial-like confrontations, not to prosecutor's investigations or interviews with witnesses); *United States* v. *Wade*, 388 U.S. 218, 227-228 (1967) (government analyses of evidence are not critical stages of a prosecution at which the accused has the right to presence of his counsel); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940) (noting that the Constitution "nowhere specifies any period which must intervene between the required appointment of counsel and trial"). See also *United States* v. *Mandujano*, 425 U.S. at 581 (opinion of Burger, C.J.) (witness before a grand jury does not have a Sixth Amendment right to counsel); *United States* v. *Ciampaglia*, 628 F.2d 632, 639 (1st Cir.), cert. denied, 449 U.S. 956 (1980) (government was not required to time the return of an indictment so the right to counsel would attach to the investigatory stage of the procedings); *United States* v. *Bennett*, 409 F.2d 888, 900 (2d Cir.), cert. denied, 396 U.S. 852 (1969) (right to counsel cases do not suggest that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence).

This Court has noted that counsel must be appointed sufficiently in advance of trial to permit "the giving of effective aid in the preparation and trial of the case" (*Powell* v. *Alabama*, 287 U.S. at 71). But the Court in *Powell* was referring to preparation during the period following initiation of adversary judicial proceedings. See *Kirby* v. *Illinois*, 406 U.S. at 688-689. There is no claim in this case that respondents' counsel had insufficient time to prepare for trial following their appointments. Counsel for the *Gouveia* respondents were appointed at the arraignments on July 14, 1980. The

Here, the triggering event was solely the retention of an inmate in segregated status for a period in excess of 90 days. Had respondents been released into the general prison population at that juncture, the court of appeals would have found no constitutional right to appointment of counsel. In assessing the need for preindictment counsel in this case, therefore, the critical focus cannot be on the benefits that appointment of counsel might have afforded to the presentation of a defense at trial, but solely on the differences between custody in administrative segregation and custody in the general prison population for purposes of preparing a defense against charges that have not yet been preferred. In evaluating this matter, we think the court of appeals doubly erred: it underestimated the opportunities available to inmates in segregation to take steps to preserve favorable evidence; and it exaggerated the likelihood that inmates released to the general prison population would take material, legitimate actions to gather evidence that would be unavailable if they remained in segregation. Realistically viewed, these differences are not of such consequence as to justify the departure from settled Sixth Amendment principles undertaken by the court of appeals.[35]

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first trial (which resulted in an acquittal of co-defendant Flores on all counts, an acquittal of respondent Reynoso on the weapons conveyance count, and a mistrial as to all other charges) began on September 16, 1980, and the retrial began on February 17, 1981. Counsel for the *Mills* respondents were appointed at the arraignments on April 21, 1980. Following dismissal of the indictment and an interlocutory appeal, the trial finally was held in January 1982. See Pet. App. 4a-5a; J.A. 1, 120.

[35] In devising this novel right to counsel the court of appeals purported to achieve "a proper balance of the interests of both prison officials and inmates suspected of crime" (Pet. App. 18a). But the court can hardly be said to have given

In assessing the court of appeals' conclusions regarding an inmate-suspect's need for the assistance of counsel in the preindictment period, it is important to recall, as an initial matter, that there are natural obstacles to preparation of any criminal case during the preindictment period—obstacles that affect both the prosecution and the defense and that exist in connection with nonprison crimes as well as prison crimes. In particular, the passage of time ordinarily makes investigation and preparation of a case more

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significant weight to the concerns of prison authorities. As we noted in our petition (at 26-29), implementation of the court's decision would cause significant practical problems. The Bureau of Prisons itself has neither statutory authority nor a source of funding with which to appoint counsel. Thus, district courts presumably would do so pursuant to the Criminal Justice Act of 1964, 18 U.S.C. 3006A(a), on the motion of an inmate, the Bureau of Prisons, or a public defender. Prison officials would have to make arrangements to ensure that preindictment investigation of the type envisioned by the court of appeals could be conducted consistently with the maintenance of order and the conduct of ongoing FBI investigations in the prison. It is unclear from the court's opinion to what extent prison officials could limit investigation by counsel to avoid compromising the identity of inmate-informants or exposing certain individuals to retaliation before prison officials could make arrangements to ensure their safety. As we have suggested at pages 26-29, *supra*, the alternative offered by the court of appeals—release of an inmate suspect into the general prison population after 90 days—would normally be unsatisfactory because of security concerns.

The record in this case does not indicate that respondents applied to a district court for appointment of counsel. In addition, it appears that only Gouveia and co-defendant Flores (who was acquitted in the first trial in the *Gouveia* case) contacted the Federal Public Defender's office in an attempt to obtain counsel while they were in administrative detention. See J.A. 45; Sept. 8, 1980, Hearing Tr. 67-69. That office informed Flores that it could not represent him until he had been charged in a criminal case (*id.* at 68-69).

difficult. In any criminal case, witnesses may disappear or die, memories may fade, and physical evidence may deteriorate during the preindictment period. These vicissitudes do not in any other context expand the right to appointment of counsel to the preaccusation stage.

In general, these normal obstacles to preindictment investigation work in favor of the defense. That is because the prosecution bears the heavy burden of proving guilt beyond a reasonable doubt in any criminal case. That burden of proof, which represents the basic protection for defendants under our system of criminal justice, largely compensates for the investigative difficulties a suspect may face during the preindictment period, regardless of whether an offense occurs inside or outside prison.

While prison crimes may present some special problems, they are not inevitably more difficult to investigate than nonprison crimes. Depending on the circumstances, nonprison crimes may present serious investigative problems. For example, when an offense has occurred on a busy street and anonymous witnesses have dispersed, both the prosecution and the defense may have great difficulty in conducting an investigation. In addition, as the dissenters noted (Pet. App. 26a),

> [e]ven free suspects often lack the investigatory advantages the majority attributes to them. Many law enforcement investigations are confidential and continue for months or years. Like [respondents], the targets in such cases have limited knowledge or none about the investigations.

The dissenters also noted (*ibid.*) that obstacles similar to those respondents faced may confront an individual who is convicted and imprisoned for one crime while investigation for other (nonprison) of-

fenses is underway or an individual whose probation or parole is revoked based on renewed criminal activity. Indeed, in any criminal case it probably will be difficult for an indigent suspect to accomplish the same things a lawyer could in the preindictment period—and there is little basis for supposing that suspects ordinarily attempt their own preindictment investigations. Perhaps, in an ideal world, the government could provide counsel prior to indictment for every indigent suspect who could benefit from such assistance in overcoming investigative difficulties. But no court has ever suggested that the Constitution confers such a wide-ranging entitlement.

In any event, assuming with the court of appeals that the relevant comparison is between administrative detention and the general prison population, the court of appeals appears to have overestimated the incremental impact on the ability to investigate suffered by an inmate who is moved from the general population to administrative detention.[26] Any inmate-suspect has certain important opportunities to investigate and preserve the names of witnesses, regardless of whether he is in the general prison population or in administrative detention. An inmate who chooses to attempt to clear himself by providing full information about his activities to FBI investigators will ensure preservation of information concerning witnesses in the form of a detailed FBI report of the interview. See, *e.g.*, J.A. 23-25, 35-37, 53-61.

In addition, normally there will be a prison disciplinary proceeding following any prison offense. In connection with that proceeding prison officials ask

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[26] Ironically, if, rather than being placed in segregation, respondents had been released from prison soon after the murders in these cases, they would probably have faced even greater obstacles to preparation of a defense than those inherent in administrative detention.

inmate-suspects to list any witnesses who might provide information about whether the inmate participated in the offense. See 28 C.F.R. 541.15(i). Thus, an inmate who is interested in clearing his name can provide information that will be summarized in disciplinary records and thereby preserved; that information would then be available for the inmate to use in a later criminal proceeding. In fact, the inmate can obtain individualized assistance in preparing for a disciplinary hearing. The Bureau of Prisons provides staff representatives to assist inmate-suspects in collecting and presenting evidence in connection with prison disciplinary hearings. Under 28 C.F.R. 541.17(b), the staff representative "shall be available to assist the inmate if the inmate desires by speaking to witnesses and by presenting favorable evidence to the [institution disciplinary committee] on the merits of the charge(s) or in extenuation or mitigation * * *."[27]

Prison disciplinary hearings take place soon after an offense has occurred (see 28 C.F.R. 541.15(b), (k))—within several weeks of the offense in each of these cases (see pages 3, 8, *supra*). Thus, in the period when memories are still fresh, any inmate-suspect can obtain the sort of investigative assistance the court below deemed necessary to preserve the

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[27] Supplemental guidelines issued by the Bureau of Prisons instruct staff representatives that their duties include: "assist[ing] the inmate in presenting whatever information the inmate wants to present and in preparing a defense;" "speak[ing] to witnesses who might furnish evidence on behalf of the inmate;" and "question[ing] witnesses requested by the inmate who are called [at the hearing]." U.S. Dep't of Justice, Federal Prison System Program Statement No. 5270.5 (Inmate Discipline and Special Housing Units), Ch. 10 at 8 (Aug. 12, 1982)). Copies of Program Statement No. 5270.5 are being lodged with the Court and provided to respondents' counsel.

right to a fair trial in a subsequent criminal prosecution and can preserve information about identities of potential witnesses.[28]

The court of appeals believed that an inmate-suspect would have no opportunity to identify potential witnesses and to establish their real names unless he were returned to the general prison population within several months of the offense. But even apart from the opportunities for preserving lists of witnesses in connection with disciplinary hearings or FBI interviews, an inmate-suspect in administrative detention is not without means to obtain information. Some inmate-suspects may have been in the general prison

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[28] Respondent Segura provided the disciplinary committee with the name of a single witness (see J.A. 40), while respondent Gouveia provided the names, or nicknames, of three witnesses (*id.* at 49). Respondent Mills apparently did not provide the names of any witnesses (*id.* at 136). Mills acknowledged that a prison hearing officer gave him an opportunity to provide a confidential list of favorable witnesses, but that he declined that opportunity. See Pet. App. 44a; J.A. 129-130. The record also indicates (*ibid.*) that Mills refused the offer of assistance of a staff representative. There is no indication in the record that the other respondents took advantage of such assistance.

In their briefs in opposition, several respondents suggested that the staff representative could not be useful because he or she is merely a prison guard "more likely to be viewed by the prisoner as a spy for the government." Ramirez Br. in Opp. 8 n.1; see also Mills & Pierce Br. in Opp. 18. But under Bureau of Prisons regulations, the inmate selects the staff representative of his or her choice (see 28 C.F.R. 541.17(b)). The Bureau informs us that the staff representative may well be a social worker or counselor. Moreover, Bureau regulations prohibit the appointment as staff representative of any individual who would have a conflict of interest (*ibid.*). We certainly cannot accept the implicit suggestion that an innocent inmate can reasonably fear that information given to the staff representative would somehow be used to "frame" him.

population for at least part of the time following the offense (as was the case with the *Gouveia* respondents [29]) and thus would have an opportunity to identify witnesses during that period. Inmates in administrative detention may submit formal requests for assistance to prison staff members and may appeal to the warden of the institution if such requests were denied. See U.S. Dep't of Justice, Federal Prison System Program Statement No. 5511.1 (May 14, 1981).[30] If an inmate made clear that such a request was in connection with preparation of his defense to anticipated criminal charges, prison officials could be expected to take steps to obtain and preserve the requested information. In addition, inmates in administrative detention have visitation and telephone privileges, as well as contact with guards, counselors, and other inmates who are in administrative detention on a short-term basis. Communication between inmates in administrative detention and inmates in the general population, either through outsiders or through the "prison grapevine," is not uncommon. Indeed, during the trial in the *Gouveia* case, several inmate-witnesses testified to direct communication between inmates in administrative detention and those in the general population (*e.g.*, through windows or vents or in the visitation area). See Tr. 1215-1216, 1644-1645, 1650-1651, 2427, 2567-2568.

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[29] Respondents Ramirez and Segura were not placed in administrative detention until December 4, 1978—three weeks after the murder of Trejo; respondents Gouveia and Reynoso were released from detention and returned to the general prison population during the period between November 22 and December 4, 1978. See pages 2-3, *supra*. There is no evidence in the record that respondents took advantage of their relative freedom in these weeks following the murder in order to conduct investigations, determine the identity of potential witnesses, or preserve testimony.

[30] Copies of Program Statement No. 5511.1 are being lodged with the Court and provided to respondents' counsel.

On the other side of the coin, an inmate who remains in the general prison population does not have unlimited opportunities to pursue investigations. Such an inmate would not have access to physical evidence in the custody of the FBI and would be unable to perform his own expert analysis of that evidence or to take steps to preserve it.[21] Inmates in the general prison population have more opportunities for contact with other inmates than do those in administrative detention. However, inmates in the general population do not have unlimited access to any part of the institution; limitations on an inmate's schedule and on his ability to enter units other than his own (see Mills Tr. 223-224) could circumscribe his ability to locate witnesses.[22]

Moreover, we question the extent to which most inmate-suspects would conduct legitimate investigations if they were returned to the general prison population. Prison officials would be derelict in their duties if they failed to take into account the possibility that "investigations" by inmate-suspects may take the form of intimidating witnesses and suborning perjury. See pages 27-29 & note 21, *supra*. Depending on the nature of the offense, even if an inmate-

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[21] Respondents Mills and Pierce contended that they were prejudiced by the deterioration of physical evidence, including the healing of their own wounds. See Pet. App. 37a. Even if they had been released to the general prison population immediately after the murder of Hall, they surely could not have prevented the developments of which they complain.

[22] The incremental difference between opportunities to investigate in administrative detention, as opposed to the general population, is even less in view of the fact that the court of appeals did not require release of the inmate to the general population for 90 days. To the extent an inmate can conduct useful investigation while in the general population, information is more likely to be available in the first months after commission of an offense than in the later period.

suspect wished to prepare a defense, he might not be able to accomplish much of use before he learned the nature of the government's case against him (*i.e.*, before the indictment is handed down).[33] In this connection, Bureau of Prisons officials have informed us that they are unaware of any instances in which retained counsel have sought access to a prison to conduct an investigation prior to indictment.

Respondents have alleged the existence of numerous missing or deceased witnesses whom they would have identified, or whose testimony they could have preserved, if they had not been in administrative detention during the preindictment period. It is hard to avoid viewing such claims with a certain amount of skepticism. It is, of course, a simple matter for a defendant to invent witnesses known only by nickname, while it is virtually impossible for the prosecution to disprove the existence or alleged usefulness of such hypothetical individuals.[34] In addition, a defendant can freely attribute guilt or exculpatory knowledge to any inmate who happens to die prior to trial. Indeed, there are a suspiciously large number of deceased witnesses who were alleged to be critical to the defense in the *Gouveia* case.[35]

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[33] Of course, investigation may be unnecessary, depending on the nature of the inmate's defense. For example, an inmate who claims he was with one other inmate at the time the offense was committed might have relatively little need to conduct an investigation if he knows the identity of that other inmate.

[34] The list of unidentified potential witnesses provided by respondent Pierce included the following: "Little Charlie, Henry's Kid, Hat, Dollars, Crow Dog, Buzzard, Indian, Droopy, The Hippie, Sluggo, Ole, Mouse, Cowboy, Fast Freddie and Weasel" (J.A. 150). Respondent Ramirez identified four potential alibi witnesses as " 'Abalone', 'Jose', 'Paharo', and 'Jesus R.C.' " (*id.* at 34).

[35] See, *e.g.*, J.A. 78 (citing three deceased witnesses who allegedly would have testified for respondent Segura).

To the extent an inmate-suspect (whether he has been in administrative detention or in the general population) has been unable to gather information prior to indictment, his counsel nevertheless is not without resources with which to trace potential witnesses once an indictment has been returned. Because of the controlled conditions of prison life, the number of potential witnesses to a prison crime normally is limited to the inmates and staff members assigned to the institution who have access to the area in which the crime occurred or in which the inmate claims to have been at the time of the crime. Although the transient nature of a prison population may complicate efforts to identify and locate witnesses, an institution may be able to provide inmate rosters that would help a defendant recall names of potential witnesses. Inmate photographs may be available to assist defendants who claim that they cannot recall names of potential witnesses or that they know only prison nicknames. The Bureau of Prisons locator system or local probation offices may be able to provide information on the location of potential witnesses who have been transferred to a different institution or released. See 28 C.F.R. 2.40(a)(4) (requiring parolees to notify their probation officers of changes in residence); J.A. 65-78. In addition, defendants may obtain substantial assistance from discovery of exculpatory information in the government's possession. See, *e.g.*, *Brady* v. *Maryland* 373 U.S. 83 (1963); Fed. R. Crim. P. 16(a)(1). In this case, respondents were able to take advantage of several of these possibilities.[36] Indeed, there is nothing in the record to dis-

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[36] For example, the *Gouveia* respondents received copies of transcripts of interviews the FBI had conducted with them following the murders. See, *e.g.*, J.A. 23-25, 35-37, 53-61. Gouveia's counsel used such a transcript to determine the identities of six potential witnesses. See J.A. 65. In addition,

prove the conclusion (and respondents never suggested otherwise) that by the time of trial they had located every potential witness of any significance whom they had been unable to find at the time of the pretrial motions. See pages 56-58, *infra*.

Again, we stress that an inmate-suspect in administrative detention has the ultimate advantage in a later criminal proceeding—the prosecution's burden of proving guilt beyond a reasonable doubt. Furthermore, it is worth noting that the prosecution itself faces significant hurdles in investigating prison crime, including difficulty in obtaining cooperation from inmate-witnesses and a shortage of witnesses whom a jury is likely to find credible. See, *e.g.*, Mills Tr. 720-721, 781-782, 851-852, 1441-1445. See also *United States* v. *Mills*, 704 F.2d at 1557 (death of key witnesses was prejudicial to both defense and prosecution); *United States* v. *Clardy*, 540 F.2d at 442.

We do not suggest that inmate-suspects would never have a remedy in cases like these. If an inmate could show that prison officials wrongly interfered with his good faith efforts to preserve a defense (for instance, by refusing to make a record of potential witnesses suggested by the inmate at the time of the disciplinary hearing) and that he suffered actual and specific prejudice from such failure, perhaps the in-

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the *Gouveia* respondents requested and obtained rosters of inmates assigned to the unit at Lompoc in which the murder of Trejo occurred. See J.A. 64, 66, 70-77. They also received unit rosters for other cellblocks and a roster listing inmates who had arrived shortly before the murder took place. See J.A. 64, 67. Several respondents apparently found the rosters unhelpful because they did not bear dates of the week of the murder and listed inmates only by last name and prison number. See, *e.g.*, Reynoso Br. in Opp. 7; J.A. 21. However, counsel for Gouveia acknowledged that he was able to determine the whereabouts of four alibi witnesses by using the prison locator system and inmate records. See J.A. 65.

mate could assert a due process claim. Compare, *e.g.*, *United States* v. *Ash*, 413 U.S. at 320 (proper safeguard against abuses during pretrial photographic display is not expansion of the right to counsel but rather prosecutor's ethical responsibility and review under the Due Process Clause); *Kirby* v. *Illinois*, 406 U.S. at 690-691 (proper safeguard against prejudicial procedures at a preindictment lineup is review under the Due Process Clause). See also *United States* v. *Lovasco*, 431 U.S. 783, 789-790 (1977) (due process inquiry into reasons for delay and prejudice to accused is appropriate in cases involving claims of preindictment delay); *United States* v. *Marion*, 404 U.S. 307, 324 (1977). But there is no indication in this case that prison officials refused to cooperate with legitimate attempts by respondents to preserve a defense. Rather, to the extent the record speaks to this point, it appears that prison officials and FBI investigators urged respondents to provide information that would clear them of suspicion. See, *e.g.*, J.A. 35, 129-130. It is respondents themselves who declined to take opportunities offered to them to preserve their defenses. See, *e.g.*, J.A. 56, 129-130, 136. Thus, there could be no basis for a finding that any constitutional right of respondents was violated.

II. ASSUMING ARGUENDO THAT RESPONDENTS HAD THE RIGHT TO APPOINTMENT OF COUNSEL AFTER BEING HELD IN ADMINISTRATIVE DETENTION FOR 90 DAYS PENDING A CRIMINAL INVESTIGATION, DISMISSAL OF THE INDICTMENTS WAS AN INAPPROPRIATE REMEDY IN THE ABSENCE OF ANY SHOWING OF ACTUAL AND SPECIFIC PREJUDICE

Even if the Court should conclude that respondents had a right to appointed counsel during the time they were in administrative detention, the court of appeals erred in ordering dismissal of the charges. The court decided (Pet. App. 20a-23a) that dis-

missal of the indictments was the only possible remedy for prejudice respondents may have suffered as a result of the failure to have appointed counsel at the preindictment stage. It concluded (*id.* at 22a) that the failure to appoint counsel created a "potential of substantial prejudice" that was sufficient to warrant dismissal of the indictments or, alternatively, that it was appropriate to presume prejudice in the prison setting. The court's opinion reflects no analysis of the trial records to determine whether they confirmed or disproved the respondents' allegations of prejudice. Rather, the court based its conclusion that substantial prejudice "may have occurred" (*ibid.*) on respondents' general assertions of prejudice and on the pretrial conclusions of the district court that had dismissed the indictment in the *Mills* case (conclusions a panel of the court of appeals found to be insufficient to support dismissal on the ground of preindictment delay (*id.* at 35a-38a)).

A. This Court's Decisions Establish That Dismissal of the Indictment Is Not a Proper Remedy for Violation of the Right to Counsel in the Absence of a Showing of Actual and Specific Prejudice

This Court has noted that dismissal of the indictment is a drastic remedy that is rarely appropriate, even in the case of constitutional violations. See, *e.g.*, *United States* v. *Blue*, 384 U.S. 251, 255 (1966). The court of appeals' dismissal of the indictments in this case on the basis of potential or presumed prejudice is clearly inconsistent with this Court's decision in *United States* v. *Morrison*, *supra*. The Court there stated that in right to counsel cases "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation [of the Sixth Amendment right to counsel] may have been deliberate." 449 U.S. at 365. The Court instructed that "remedies

should be tailored to the injury suffered from the constitutional violation" and that the proper approach in right to counsel cases is to identify and neutralize any taint "by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial" (*id.* at 364, 365). Although the court of appeals purported to abide by the teachings of *Morrison* (Pet. App. 20a, 22a), its treatment of prejudice cannot be reconciled with the reluctance to allow dismissal of serious criminal charges evinced by that decision.

The court of appeals seized on this Court's reference in *Morrison* (449 U.S. at 365) to the possibility that dismissal of the indictment might be an appropriate remedy if there were a "substantial threat" of "demonstrable prejudice." The court of appeals reformulated these terms and concluded that dismissal would be proper when the failure to appoint counsel "creates the potential of substantial prejudice" (Pet. App. 22a). But that formulation is not the same as the standard of *Morrison*; rather, *Morrison* makes clear that dismissal of the indictment is an extraordinary remedy that should be confined to cases in which prejudice is concrete, substantial, and irremediable by less drastic means. Moreover, *Morrison* would seem to require a case-specific analysis of prejudice, rather than a presumption, whenever possible.[37]

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[37] We argue in our brief in *United States* v. *Cronic*, No. 82-660, and in our brief as amicus curiae in *Strickland* v. *Washington*, No. 82-1544, that in cases involving claims of ineffective assistance of counsel a court must assess whether the defendant was prejudiced in a manner that probably affected the outcome of the trial. See, *e.g.*, *Morris* v. *Slappy*, *supra*, slip op. 9-10; *United States* v. *Decoster*, 624 F.2d 196, 208 (D.C. Cir.) (en banc) (plurality opinion), cert. denied, 444 U.S. 944 (1979). Respondents' claims that they were unable to conduct adequate investigations and to present exculpatory evidence because of the failure to appoint counsel

The court of appeals concluded that a presumption of prejudice would be appropriate in the case of inmate-suspects in administrative detention "because ordinarily it will be impossible adequately either to prove or refute its existence," so that it would be necessary to "tip the scales in favor of the locked away accused" in order to vindicate the right to counsel (Pet. App. 22a). But this Court has made clear that the lower courts normally must make case-by-case evaluations to determine whether constitutional violations have resulted in a degree of actual prejudice that would justify dismissal of the indictment. The sort of prejudice claimed by respondents—dimmed memories, inaccessible witnesses, and lost evidence—is most similar to that involved in claims of prejudice resulting from preindictment delay in violation of the Due Process Clause. See *United States* v. *Marion*, 404 U.S. at 325-326. The analysis of prejudice in such cases normally is not an easy task, since it may be difficult to be certain of just what evidence a defendant could have produced in the absence of the alleged constitutional violation. But this Court's decisions require such an analysis, even when the prosecutor has deliberately and unfairly delayed an indictment in order to secure a tactical advantage at trial. See *United States* v. *Lovasco*, 431 U.S. at 790. We find it difficult to understand why the court of appeals deemed it necessary to dispense with such a case-specific inquiry in the right to counsel context.

The court of appeals suggested that dismissal of the indictments was the only adequate remedy in cases like these because "[p]rison crimes present suspects with unique investigatory and evidentiary

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in the preindictment period are not unlike claims of ineffective assistance of counsel. See Pet. App. 21a.

obstacles" (Pet. App. 20a). But as we explained above, defendants who have been in administrative detention in the preindictment period are nevertheless not without means of identifying potential sources of favorable information. A court that evaluates prejudice from the lack of appointed counsel during administrative detention should consider, *e.g.*, the opportunities for investigation and preservation of information afforded to a defendant in connection with the prison disciplinary proceeding (including the assistance of a staff representative), the amount of time a defendant may have spent in the general prison population following the offense before being placed in administrative detention, and the information a defendant's counsel may have received in the form of inmate rosters and photographs or discovery of exculpatory information in the government's possession. In addition, the court should consider the extent to which a defendant would have benefited from appointment of counsel in light of the nature of his defense, as well as the strength of the prosecution's case. Such considerations may establish that a particular defendant has not been prejudiced by the "unique investigatory and evidentiary obstacles" the court of appeals perceived.

Moreover, a court must analye prejudice in light of the record made at trial.[38] This Court has indicated that evaluations of prejudice arising from alleged constitutional violations generally are best made from

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[38] It appears that none of the respondents renewed and supplemented their motions to dismiss the indictments following trial. Rather than arguing that their pretrial contentions of inability to prepare a defense had been borne out by their experience at trial, respondents continued to rely primarily on general contentions of prejudice. In view of the extensive defenses respondents were able to present at trial (see pages 56-59, *infra*), it is understandable that they preferred not to argue from a post-trial perspective.

a post-trial perspective. For example, in *United States* v. *MacDonald*, 435 U.S. 850 (1978), the Court held that a defendant may not take a pretrial appeal based on an alleged violation of his Sixth Amendment right to a speedy trial. It explained that "[b]efore trial * * * an estimate of the degree to which delay has impaired an adequate defense tends to be speculative" and that "[n]ormally, it is only after trial that that claim may fairly be assessed" (*id.* at 858, 860).[39] Such reasoning applies with equal force to right to counsel cases. Most obviously, a defendant who is acquitted (as was co-defendant Flores in the first *Gouveia* trial, despite the fact that he had been in administrative detention or at another institution during most of the preindictment period, see J.A. 8-9) cannot be said to have suffered prejudice. In evaluating allegations of prejudice in other cases, a court should consider, *e.g.*, the nature of the testimony of witnesses the defendant presented at trial. If the testimony of alleged missing or deceased witnesses would have been cumulative to the testimony of witnesses who appeared, the court may not conclude that the defendant was seriously prejudiced by the inability of counsel to locate every possible potential witness. See, *e.g.*, *United States* v. *Tempesta*, 587 F.2d 931, 933-934 (8th Cir. 1978), cert. denied, 441 U.S. 910 (1979).

The court of appeals' willingness to forgo a post-trial, case-specific analysis and to presume prejudice fails to give adequate consideration to "society's in-

[39] See also *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 15, in which the Court noted that where the government places a percipient witness beyond the reach of process "judges may wish to defer ruling on motions until after the presentation of evidence," since determinations of materiality for the purpose of assessing prejudice "are often best made in light of all of the evidence adduced at trial."

terest in the administration of criminal justice" and to whether the relief it fashioned did "not unnecessarily infringe on competing interests" (*United States* v. *Morrison*, 449 U.S. at 364). See also *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983) (per curiam), slip. op. 3-4; *United States* v. *Hasting*, No. 81-1463 (May 23, 1983), slip op. 7; *United States* v. *Blue*, 384 U.S. at 255. The court of appeals gave no serious consideration to the availability of other remedies that might help overcome the alleged prejudice in a given case.[40] In addition, it failed to acknowledge the serious practical consequences that would flow from dismissal of the indictments in this and similar cases. As we pointed out in our petition (at 29), violent prison crimes have become a serious threat to the security of both federal and state prisons in recent years. The remedy prescribed by the court of appeals allows especially dangerous individuals who have committed serious prison crimes to escape criminal penalties entirely. Such consequences only reinforce the conclusion that, assuming the court of appeals was correct in creating a right to counsel in the circumstances of this case, no court should dismiss an indictment in such a case unless a searching assessment of the record reveals that a defendant suffered such serious actual prejudice that he can be said to have been denied a fair trial.

B. The Record in This Case Refutes the Court of Appeals' Conclusion That Prejudice Must Be Presumed in the Prison Setting

The record in this case illustrates well why the court of appeals' generalizations about the prison

[40] As the dissenters noted (Pet. App. 28a-29a), there are remedies short of dismissal of the indictment (including cross-examination, argument to the jury, and instructions concerning missing evidence) that can mitigate possible prejudice in cases like this one.

setting do not support a presumption of prejudice from the failure to appoint counsel during the period of administrative detention. Even respondents' pretrial allegations were inadequate to establish a probability of concrete prejudice sufficient to warrant dismissal of the indictments. Assuming their allegations had been sufficient, the evidence respondents were able to offer at trial disproved their contention that lack of appointed counsel at the preindictment stage deprived them of a fair trial.

1. As a preliminary matter, we note that respondents' pretrial allegations did not establish a probability that they would suffer the sort of prejudice that would warrant dismissal of the indictments. As noted above, the harm that respondents alleged—missing or deceased witnesses, dimmed memories, and deterioration of physical evidence—is similar to the sort of alleged prejudice considered by courts in connection with claims of preindictment delay motivated by bad faith tactical considerations. See *United States* v. *Lovasco*, 431 U.S. at 796-797; *United States* v. *Marion*, 404 U.S. at 325-326. Thus, in the absence of any precedent for assessing prejudice resulting from the lack of appointed counsel in the preindictment period, it seems most appropriate to measure respondents' allegations against the standards courts apply in the preindictment delay cases.

The court of appeals concluded that substantial prejudice "may have occurred" in this case because the government was unable to "rebut convincingly" respondents' showing of potential prejudice (Pet. App. 22a). But that approach improperly shifts the burden of proof, which should rest on respondents to demonstrate actual prejudice. A defendant who alleges loss of a witness as a result of preindictment delay bears the burden of establishing what the alleged missing witness's testimony would have been

and how it would have helped his defense. "The mere allegation that [a missing witness] could have testified for the defendant does not establish that he would have so testified or that his testimony would have been helpful." *United States* v. *Pino*, 708 F.2d 523, 528 (10th Cir. 1983).[41]

Respondents' allegations that missing witnesses would have provided favorable testimony do not meet that standard. For example, counsel for respondent Segura alleged that he was unable to present the

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[41] See also, *e.g.*, *United States* v. *Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983) (vague and conclusory allegations of prejudice resulting from the passage of time and absence of witnesses are insufficient to constitute showing of actual prejudice); *United States* v. *Surface*, 624 F.2d 23, 25 (5th Cir. 1980) (bald assertion that missing witness would have testified favorably to defense, without extrinsic support, was not adequate to show actual prejudice); *United States* v. *D'Andrea*, 585 F.2d 1351, 1356 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979) (absent substantial identification of the way in which missing witnesses' testimony would have aided the defense, claims of prejudice were too speculative to satisfy the requirement of actual prejudice); *United States* v. *King*, 560 F.2d 122, 130 (2d Cir.), cert. denied, 434 U.S. 925 (1977) (absent ability to say with specificity or assurance what deceased witness would have said and how his testimony would have aided the defense, no basis for claim of prejudice); *United States* v. *Mays*, 549 F.2d 670, 679-680 (9th Cir. 1977) (claim of exculpatory testimony by missing witnesses was inadequate when based only on speculation and "self-serving" affidavits of defendants); *United States* v. *Avalos*, 541 F.2d 1100, 1108 (5th Cir. 1976), cert. denied, 430 U.S. 970 (1977) (conclusory allegations concerning loss of potential defense witnesses insufficient). And see *United States* v. *Valenzuela-Bernal*, slip op. 14 (under either the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment, a defendant cannot establish that the government's deportation of known percipient witnesses deprived the defendant of a fair trial "unless there is some explanation of how their testimony would have been favorable and material").

testimony of several alibi witnesses due to the death of some and the inability to locate others. He admitted, however, that he did not know "to what degree they would be valuable witnesses" (J.A. 81; see also J.A. 27).[42] Respondent Mills alleged that the passage of time prevented him from locating witnesses known only by nicknames who could support his alibi that he was in the prison mess hall at the time of the murder, while respondent Pierce speculated that unidentifiable witnesses "might" have presented testimony that would have helped him in formulating a defense (Pet. App. 36a-37a).[43] But as the panel in the *Mills* case pointed out (*id.* at 37a), there was no

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[42] Counsel for Ramirez stated that one individual Ramirez allegedly had seen in the prison gymnasium at the time of the murder had died and that others could not be located (J.A. 84; see also J.A. 34). But he presented no evidence that the missing witnesses would have testified that they had seen Ramirez at the time the murders were committed. Counsel for Gouveia alleged that, because of the transfer or release of some inmates and the inability to locate others known only by prison nicknames, he was unable to find several inmates who may have seen Gouveia at the time of the murder and one "theoretical percipient witness to the murder" itself (J.A. 91). But he made no showing that the potential witnesses would have presented evidence favorable to the defense if called to testify. Counsel for Reynoso alleged prior to trial that two potential alibi witnesses had died and that several others could not be located (J.A. 21), but he never proffered any assurance that the missing witnesses could have provided favorable testimony.

[43] Counsel for Pierce also alleged that several potential alibi witnesses were reluctant to testify out of apprehension that, because of dimmed memories, they might present incorrect testimony and thereby subject themselves to charges of perjury (J.A. 152-154). He acknowledged, however, that his allegations were based only on his personal belief that the potential witnesses could present favorable evidence and were reluctant to testify because of their uncertainty about specific details. See *id.* at 153.

evidence to support Mills' contentions other than his self-serving affidavit, and Pierce's speculation that missing witnesses "might" have been useful did not show actual prejudice.[44]

Several respondents also alleged that the recollections of potential defense witnesses had dimmed because of the passage of time and that the potential witnesses were unable to recall the details of their activities. See, *e.g.*, Pet. App. 20a, 36a; J.A. 116-117, 153-154.[45] But in cases involving claims of pre-indictment delay it is settled law that the general claim that memories have dimmed because of the passage of time is not the sort of substantial actual prejudice that constitutes a predicate for reversal. See, *e.g.*, *United States* v. *Marion*, 404 U.S. at 325-326; *United States* v. *Rogers*, 639 F.2d 438, 441 (8th Cir. 1981); *United States* v. *Elsbery*, 602 F.2d 1054, 1059 (2d Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Avalos*, 541 F.2d 1100, 1108 (5th Cir. 1976). As the Seventh Circuit explained in *United States* v. *Cowsen*, 530 F.2d 734, 736, cert. denied, 426 U.S. 906 (1976):

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[44] The panel also noted (Pet. App. 36a) that "[p]rison nicknames do not erase the element of speculation. There was no showing that these nicknames were recorded and actual identities or the existence of the witnesses could not be associated with any certainty."

[45] It seems to us inherently implausible that witnesses who would have remembered enough to support respondents' alibis 90 days after the murders would later have forgotten. Several respondents filed declarations stating that other inmates normally are well aware that an inmate has been segregated from the general prison population because he has been found in a disciplinary hearing to have murdered another inmate (J.A. 18, 134). Surely an individual who knew that the inmate-suspect in fact had an alibi for the time of the murder, and thus had been wrongly identified as the murderer, would recall that information clearly for at least several years.

> A claim of faded memory, the veracity of which can rarely be satisfactorily tested, can be plausibly asserted in almost any criminal case in which the defendant is not charged within a few weeks, at most, after the crime * * *. If the limitation period for prosecution were measured by the length of the defendant's memory of routine events, few crimes could be prosecuted.

See also *United States* v. *Juarez*, 561 F.2d 65, 68-69 (7th Cir. 1977) (faded memory claim is inherently speculative as to its impact on a given case). To the extent a particularized showing that the failure to recollect specific facts due to the passage of time may provide a basis for a claim of prejudice (see, *e.g.*, *United States* v. *Mays*, 549 F.2d 670, 680 (9th Cir. 1977)), the defendant must demonstrate specifically how the forgotten testimony would have aided his cause in some substantial way. See *United States* v. *Jenkins*, 701 F.2d 850, 855 (10th Cir. 1983); *United States* v. *D'Andrea*, 585 F.2d 1351, 1356 (7th Cir. 1979), cert. denied, 440 U.S. 983 (1979). But respondents neither established that any alleged lack of recollection resulted from the passage of time nor identified how any specific information would have materially assisted their defense if witnesses had been able to recall it at the time of trial.[46]

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[46] For example, in his opening brief in the court of appeals (at 12), respondent Gouveia simply alleged that several defense witnesses could not recall certain unspecified facts and had to rely on habit evidence in order to answer counsel's questions about their activities on the day of the murder of Trejo. As an example, Gouveia stated in his reply brief (at 6-7) that one Tony Estrada could not remember the television program he had been watching at the time of the crime. But Gouveia made no showing that such information was relevant or that it would have materially aided his defense had it been within Estrada's recollection.

Finally, respondents Mills and Pierce maintained that they were prejudiced because of the loss of physical evidence due to the lapse of time following the murder of Hall. Mills and Pierce pointed to the deterioration of bloodstains on clothing, the healing of wounds and bruises on their bodies, and the destruction of prison records by government employees (see, *e.g.*, Mills & Pierce Br. in Opp. 4; Pet. App. 37a). Since their release from detention after 90 days could not conceivably have aided them in preserving such evidence, this factor cannot possibly be considered in support of a claim of prejudice. Moreover, as the panel observed (*ibid.*), absent any evidence of deterioration rates or the point at which the prison documents allegedly were destroyed, it is entirely speculative whether the losses resulted from the passage of time prior to appointment of counsel or whether the evidence would have been unavailable to the defense even if the government had returned an indictment within a month of the murder.[47]

2. Even if respondents' allegations of prejudice had established a prima facie case that they were in danger of being deprived of a fair trial because of the lack of appointed counsel in the preindictment period, that proposition was disproved by the evidence respondents in fact offered at trial. For example, the *Gouveia* respondents asserted that, because of the passage of time, they would be unable to locate and present the testimony of witnesses who could verify their whereabouts at the time the murders were committed. But at trial they presented the testimony of 14 alibi witnesses (Pet. App. 28a). Five witnesses corroborated Segura's testimony that he

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[47] See also *United States* v. *MacDonald*, 632 F.2d 258, 269-270 (4th Cir. 1980) (Bryan, J., dissenting), rev'd, 456 U.S. 1 (1982); *United States* v. *Walker*, 601 F.2d 1051, 1057 (9th Cir. 1979).

was playing handball in the morning and that at the time the murder was committed he was playing pool and watching a football game on television (*e.g.*, Tr. 1568-1569, 1579-1590, 1596-1597, 1610-1612, 1764-1767, 2141-2148). Three witnesses testified in support of Gouveia's story that on the morning of the murders he was eating in the dining hall and thereafter went to the gymnasium (*id.* at 1549-1550, 1680-1681, 2114-2119, 2370-2378). Two witnesses testified that they were watching a football game with Reynoso at the time of the murders (*id.* at 1418-1420, 1442, 1520-1525).[48] Another witness verified Ramirez' testimony that he was lifting weights at the gymnasium at the time of the murder (*id.* at 1939, 2245-2247).[49]

The trial of Mills and Pierce likewise refuted their pretrial contention that they would be unable to present witnesses who could verify their alibis and their claim that the murderer was disguised and therefore could not be identified. Six witnesses testified that at the time the murder was committed Mills and Pierce were eating a meal and that they were locked in the dining hall with other prisoners immediately after discovery of the murder (Mills Tr. 756-758, 777-779, 801-804, 819-824, 849-851, 1135-1137). Three other witnesses testified that they had observed the murder

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[48] Reynoso alleges now simply that he "lost the opportunity to locate and call witnesses who could corroborate his two alibi witnesses" (Reynoso Br. in Opp. 6).

[49] In addition, the *Gouveia* respondents presented the testimony of the inmates who, according to the government's witnesses, fabricated the murder weapons and carried them into the prison. Both inmates denied any involvement in the crime (*e.g.*, Tr. 1795-1796, 2424). Other witnesses testified that government witness Steven Kinard had told them that he and another prisoner (who had since died), rather than respondents, had murdered Trejo because of a dispute over drugs (*id.* at 1855-1864, 1894-1897, 2064).

and that, contrary to testimony presented by a government witness, the assailants were masked at all times, so that their identities could not be determined (*id.* at 985-992, 1028-1030, 1048-1050).[50] Thus, none of the respondents was precluded from presenting a substantial defense because of an inability to locate witnesses.[51] Indeed, respondents never claimed that they did not succeed eventually in locating all of the significant witnesses they had not found at the time of the pretrial motions.

Despite their pretrial predictions, Mills and Pierce in fact were able to present a substantial amount of expert testimony concerning physical evidence. A forensic pathologist who examined the scars on Mills'

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[50] The *Mills* respondents also presented three inmates who testified that they were watching the entrance to the unit in which the murder of Hall occurred but did not observe respondents enter or leave (Mills Tr. 682, 708-709, 728-729). Inmates also testified that shortly after the murder the guard who had identified Mills at trial as one of the inmates who had fled from the unit in which Hall was murdered stated that he did not know the identities of Hall's assailants (*id.* at 684-685); that, prior to testifying that Mills admitted committing the murder, an inmate-witness stated that he would testify falsely in order to obtain leniency from prison authorities (*id.* at 971-973); that Hall had many enemies within the prison population as the result of his reputation as an informant and his involvement in drug dealings (*id.* at 734, 1086-1087, 1097, 1107-1109, 1451); and that bruises and cuts observed on the respondents' bodies shortly after the murders resulted from athletic injuries (*id.* at 1223-1225, 1325-1328).

[51] The court of appeals rejected the government's contention that additional alibi testimony would have been cumulative on the ground, inter alia, that it was incorrect to assume "that the quantity of witnesses always can overcome the absence of any particular defense witness" (Pet. App. 23a). But neither the court nor the respondents pointed to any alleged missing witness whose testimony would have been qualitatively more valuable than that of the witnesses who testified.

arms and photographs of Mills' wounds and marks on Pierce's upper arm testified that, in his opinion, the injuries could not have been sustained during the murder of Hall (Mills Tr. 1278-1288). A forensic scientist testified (*id.* at 902-903) that hair fibers discovered on knit ski caps allegedly worn by the assailants during the murder did not correspond to hair samples taken from Mills and Pierce. A serologist testified (*id.* at 911-917) that, on the basis of his own tests and a review of FBI testing procedures, tests conducted by the FBI on a pair of blood-stained trousers worn by Mills on the day of the murder could not yield conclusive evidence of blood type.[52] Finally, a neurologist testified (*id.* at 1312-1318) that Pierce was decidedly left-handed, providing support for the contention that it was unlikely that Pierce was Hall's assailant since the murder was committed by a right-handed person.

Respondents had the benefit of appointed counsel who conducted extensive investigations in preparation for trial and, as the dissenters noted (Pet. App. 28a), presented "defenses of uncommon quality and vigor." Thus, it is not surprising that the record demonstrates that respondents were able to produce very substantial amounts of evidence in support of their defenses (including 34 witnesses for the *Gouveia* respondents and 42 witnesses for Mills and Pierce). There is no indication in the court of appeals' opinion that it considered any of the record material discussed above. Indeed, had it done so, the court would have been hard-pressed to support its conclusion that prejudice must be presumed and that

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[52] In addition, the government's own expert witness testified that he had been unable to reach a definite conclusion about the type of the blood on trousers Mills and Pierce had been wearing on the evening of the murder (Mills Tr. 420-424).

substantial prejudice in fact "may have occurred" in this case (*id.* at 22a). The court of appeals' analysis of prejudice was clearly inadequate under either the standard courts use to measure prejudice in cases of bad faith preindictment delay or, a fortiori, under the high standard for right to counsel cases referred to by this Court in *United States* v. *Morrison*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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